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No. 83-801

IN THE

Supreme Court of the United States

October Term, 1983

PICKANDS MATHER & CO., as Managing Agent for Erie Mining Co.,

Petitioner,

v.

COMMISSIONER OF REVENUE OF THE STATE OF MINNESOTA, and RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

LAURENCE J. KLUN
P. O. Box 240
Ely, Minnesota 55731
Telephone: (218) 365-3221
Counsel for Respondent Range Municipalities and Civic Association

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
MICHAEL P. SULLIVAN*
DAVID C. BAHLS
Special Counsel
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800
Counsel for Respondent Commissioner of Revenue

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether the limitation imposed by Minn. Stat. § 298.40 on the combined occupation, royalty, and excise taxes of taconite companies is unconstitutional under the Commerce Clause of the Constitution of the United States or the Due Process Clause of the Fourteenth Amendment.

2. Whether the Contract Clause of the United States Constitution is violated by the Minnesota Supreme Court's construction of Minn. Stat. § 298.40.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Jurisdiction	1
Additional Relevant Constitutional and Statutory Provisions	2
Statement	2
Reasons for Denying the Writ	4
1. Due Process and Commerce Clauses	5
a. Neither the Decision Below Nor the Record Raises the Question Presented in this Petition	6
b. Section 298.40 Does Not Violate the Due Process or Commerce Clauses	8
c. There is no Substantial Federal Question	10
2. Contract Clause	11
a. Neither the Decision Below Nor the Record Raises the Contract Clause Question Presented in the Petition	12
b. The Petitioner's Constitutional Rights Were Not Violated By the Minnesota Supreme Court's Decision	13
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Bailey v. Anderson, 326 U.S. 203 (1945)	7
Cardinale v. Louisiana, 394 U.S. 437 (1969)	13

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 6
Hortonville District Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976) 6
Illinois v. Gates, 103 S.Ct. 2317 (1983) 12
Keefe v. Clark, 322 U.S. 394 (1944) 13
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934) 6-7
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 8
Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1922) 5
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 7
Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) 11, 12, 15
United States v. Atkinson, 297 U.S. 157 (1936) 8
Webb v. Webb, 451 U.S. 493 (1981) 6

Statutory Provisions:

Minn. Stat. Ann. §298.01 (1983) 2, 3, 5
Minn. Stat. Ann. §298.40 (1972) 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15

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The Respondents, Commissioner of Revenue of the State of Minnesota and the Range Municipalities and Civic Association respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 334 N.W.2d 155 (1983).

JURISDICTION

Petitioner states this Court has jurisdiction under 28 U.S.C. § 1257(3). As will be discussed fully in the reasons

for denying the Writ, this Court should not take jurisdiction since the questions were not raised in or decided by any court below.

ADDITIONAL RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 298.01, Subdivision 2, of Minn. Stat. (1983) provides, in part:

> Every person engaged in the business of producing or mining taconite, semi-taconite and iron sulfides in this state shall pay to the state an occupation tax equal to 15% of the valuation of all taconite, semi-taconite and iron sulfides mined or produced after December 31, 1970.

STATEMENT

Petitioner's STATEMENT requires clarification. Its heavy emphasis on the history of mining in the State of Minnesota and the genesis of the "Taconite Amendment", and its deficiency in describing the limitation imposed by Minn. Stat. §298.40 obscure the salient facts. They are not very complex. Simply stated, Minn. Stat. §298.01 imposes an occupation tax based upon the value of the taconite, semi-taconite and iron sulfides mined in Minnesota by Petitioner. Over forty years after this tax was adopted, Minn. Stat. §298.40 was enacted. It imposed limitations on the amount of a taconite company's occupation taxes. The limitation was stated in terms of the highest of two alternatives. The alternative limitation which is relevant in this matter provides that the occupation taxes payable shall be no greater than the taxes which would be payable

if the taxpayer were subject to a hypothetical income tax computed in accordance with special rules and exceptions laid out in Section 298.40. The "Taconite Amendment" merely states that Section 298.40 cannot be amended for 25 years.

The constitutionality of the occupation tax imposed by Section 298.01 is not at issue. Petitioner has not argued that a limitation such as that imposed by Section 298.40 is required to avoid a constitutional challenge of an occupation tax. If the limitation of Section 298.40 had not been adopted, there would be no issue before this Court.

The Petitioner is in effect asserting that because the State of Minnesota has chosen to place a limitation upon an occupation tax and that limitation is based upon a hypothetical income tax computation, the computation of the limitation must incorporate all of the income apportionment requirements imposed by the Constitution of the United States in respect to a state income tax. This would be required notwithstanding the fact that the Minnesota Supreme Court, in the proceedings below, found that there was a clear and explicit provision in Section 298.40 which precluded apportionment in this hypothetical income tax computation.

In summary, the occupation tax is based upon the value of the minerals mined by the taxpayer rather than upon income generated or any sales made. The determination of the limitation on the amount of occupation tax payable requires a computation of a hypothetical income tax which does not provide for apportionment of the hypothetical income.

REASONS FOR DENYING THE WRIT

The Petitioner asserts that the Petition for Writ of Certiorari should be granted so this Court can review two federal questions: 1) whether the limitation on the occupation tax violates the Due Process and Commerce Clauses, and (2) whether the Minnesota Supreme Court's decision violates the Contract Clause.

The Petition for Writ of Certiorari should be denied with respect to the first question. Specifically, this Court should not take jurisdiction to hear the question. The issue was not raised or decided by any court below as is required for this Court to take jurisdiction under 28 U.S.C. § 1257 (3). Moreover, Section 298.40 does not violate the Due Process or Commerce Clauses. While those clauses require apportionment of income for an actual state income tax, those clauses do not require apportionment in computing a tax limitation on an occupation tax even if the computation of the limitation is made in part by reference to certain income tax statutes.

The Petition for Writ of Certiorari also should be denied with respect to the second question. This Court should not take jurisdiction to hear the question. The record must establish that the question was decided by the state court before this Court should take jurisdiction under 28 U.S.C. § 1257(3). This question was never raised in or decided by any state court. Moreover, the Minnesota Supreme Court's decision does not violate the Contract Clause. The decision could not strip Erie of its contractual right to apportionment in computing the tax limitation under Section 298.40 since Erie never had the right to apportionment.

1. Due Process and Commerce Clauses.

The Petitioner states that the first question is whether the Commerce Clause of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment forbid the State of Minnesota from apportioning a mining company's income to itself. Three points of clarification need to be raised.

First, Section 298.40 does not impose an actual tax on income. Rather it imposes a limitation on the occupation tax. The limitation is computed by applying some, but not all, of the income tax statutes to imputed gross receipts of the company. It is simply a hypothetical computation, not an actual tax.

Second, Petitioner does not assert that the Due Process or Commerce Clauses require apportionment for the occupation tax itself. However, contrary to Petitioner's statement that the occupation tax is levied on the "interstate transfer of taconite" (Petition at 15), the occupation tax is a tax on certain mining companies which is "equal to 15% of the valuation of all taconite, semi-taconite and iron sulfates mined or produced. . . ." Minn. Stat. §298.01, Subdivision 2. The occupation tax is based solely on the value of ore mined, not on the interstate transfer of the taconite and not on any sales or income generated from such a transfer. This Court has determined that the Minnesota occupation tax is a tax on the local business of mining and does not violate the Commerce Clause. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1922).

Third, it is important to note what is not at issue. The issue is not whether Section 298.40 permits apportionment. Nor is the issue whether Erie has sales for purposes of the apportionment formulae. The Minnesota Supreme

Court has already held that Section 298.40 does not provide for the application of the apportionment formulae in computing the limitation on the occupation tax regardless of whether Erie has any sales. The United States Supreme Court is bound by the Minnesota Supreme Court's interpretation of the Minnesota statute. *See Hortonville District Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976), *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285 (1961).

Therefore, the only federal question is whether the fact that Section 298.40 does not provide for apportionment of imputed gross receipts in computing the limitation on the occupation tax renders Section 298.40 unconstitutional under the Due Process Clause or the Commerce Clause. The Respondents maintain that the limitation is constitutional. If the limitation is unconstitutional, however, as Petitioner claims, the limitation would be void but the tax itself would remain valid. Such a determination would provide Petitioner no relief.

a. Neither the Decision Below Nor the Record Raises the Question.

This Court should not take jurisdiction to hear this question. This Court should not take jurisdiction to review a decision of a state court pursuant to 28 U.S.C. §1257(3) unless each of the following requirements is fulfilled: (1) the federal issue of the validity of the statute is raised before the state court, (2) that federal issue is actually decided by the highest state court, and (3) the record before this Court establishes that the first two requirements are fulfilled. *Webb v. Webb*, 451 U.S. 493, 496-97 (1981), *Lynch v. New York ex rel.*

Pierson, 293 U.S. 52, 54 (1934). It is not sufficient to raise the issue in a petition for rehearing. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945), *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

None of these requirements are met. The validity of Section 298.40 under the Due Process or Commerce Clauses was never drawn into question in any of the state court proceedings. The issue before the state courts was the construction of Section 298.40, not its validity. Since the Constitutional issue was not raised, the issue obviously was not decided by the Minnesota Supreme Court and, accordingly, the record before this Court makes no mention of this issue. Clearly, this Court should not take jurisdiction over this federal question.

Petitioner contends that the Due Process argument was raised before the Minnesota Tax Court. First, while the Due Process Clause was raised in Petitioner's Pretrial Brief before the Tax Court, the Clause was not raised in the context of challenging the constitutionality of Section 298.40. Second, even if the question were raised, this Court should not take jurisdiction since the question was not decided and since the record does not establish that the question was raised and decided.

Petitioner, apparently recognizing this defect in jurisdiction, submits that this Court nonetheless has jurisdiction since the Minnesota Supreme Court committed a plain error. The plain error doctrine, however, generally is limited to cases which the Court has already decided to review and the issue is whether the Court can review a federal question that was not presented in the petition for writ of certiorari. While this Court has, in rare circumstances, granted a petition for a writ of certiorari to

review a state case even though the federal question involved was not raised before the state court, Respondents submit that this case is not an appropriate one for this Court to exercise that discretion. This Court, in *United States v. Atkinson*, 297 U.S. 157 (1936), described the rare circumstances in which such discretionary jurisdiction should be exercised.

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if such errors are obvious, or if they otherwise severely affect the fairness, integrity or public reputation of judicial proceedings.

297 U.S. at 160. Furthermore, the Court should be particularly reluctant to grant a writ of certiorari in cases coming from a state court in which a state statute is being challenged as unconstitutional where the constitutional challenge was not raised in the state court. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). The plain error doctrine is generally applied only in criminal cases. This is a civil case involving the constitutionality of a state statute. There is no obvious error in the Minnesota Supreme Court's decision.

b. Section 298.04 Does Not Violate the Due Process or Commerce Clauses.

At issue is the constitutionality of a limitation placed on an occupation tax. Petitioner contends that the limitation violates the Due Process and Commerce Clauses since the limitation is computed without apportionment. As stated above, Petitioner does not contend the occupa-

tion tax itself violates the Due Process or Commerce Clauses even though apportionment is not permitted under the occupation tax. Rather, Petitioner contends that the *limitation* subsequently imposed on the occupation tax violates those Clauses.

Petitioner raises this question not because of the nature of either the limitation or the tax being limited, but because of the manner in which the limitation is computed. If the state had enacted a fixed limitation on the occupation tax, Petitioner presumably would not contend that the limitation violated the Due Process or Commerce Clauses since there would be nothing to apportion. The state, however, chose to enact a limitation the computation of which is in part determined by reference certain income tax statutes. The limitation is computed by applying those statutes to imputed gross receipts (as described in Section 298.40) regardless of the mining company's actual sales, receipts, or income. Petitioner is asserting that, since the state chose to enact a limitation which is computed with some reference to the income tax statutes, the limitation must fulfill all of the constitutional requirements of an income tax.

Petitioner cites cases which hold that the Due Process and Commerce Clauses impose a limitation on a state's authority to tax businesses operating in interstate commerce. Those cases hold that apportionment of income is required in actual state income taxes so as to limit the state's power to levy an income tax to economic activity within the taxing state's borders. Without this requirement, several states could tax the same income and a corporation doing business in more than one state could be subject to double taxation on that income. Hence, there

may be a burden on interstate commerce. Obviously, this result can occur only if a corporation is subject to an actual tax. Although all of the cases cited by Petitioner deal only with actual state taxes, Petitioner extrapolates from these cases that these constitutional restrictions also apply to a limitation on a tax if that limitation is computed in part by reference to state income tax statutes. Petitioner argues that, while the occupation tax without a limitation does not result in a burden on interstate commerce, the enactment of an upper limitation on the tax creates a burden on interstate commerce.

The fallacy of Petitioner's argument is clear. A limitation on a tax cannot result in double taxation. This is true whether the limitation is a fixed amount or whether it is computed by reference to certain state income tax statutes. Double taxation can result only from actual taxes. A tax limitation is unconstitutional under the Due Process or Commerce Clauses only to the extent its application to the underlying tax renders the underlying tax unconstitutional under these Clauses. Petitioner does not deny that the occupation tax, with or without the limitation, does not violate the Due Process or Commerce Clauses and does not create a burden on interstate commerce.

c. There is no Substantial Federal Question.

This Court also should not grant this Petition for Writ of Certiorari since any federal question involved is limited to this special situation in Minnesota. No federal statutes or cases were relevant to the decision of the Minnesota Supreme Court. There is no split of authority on the question. No other state has a similar statute so any decision will have no further application.

Moreover, the question is hypothetical. Erie's occupation tax liability is below the limitation. Therefore, Erie's tax liability is the same as it would be if the limitation had not been enacted. Consequently, striking down the limitation as unconstitutional will not affect Erie's tax liability as long as the underlying occupation tax, which is not challenged, remains operative. Further, striking down the limitation would provide Petitioner no relief.

2. Contract Clause.

The second federal question, as stated by the Petitioner, is whether this Court's decision in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), should be modified to extend the application of the Contract Clause of the Federal Constitution to judicial actions. The *Tidal Oil Co.* case limited the Contract Clause to legislative acts.

The Petition for Writ of Certiorari should be denied with respect to this question. Since this is the first time the issue has been raised in these proceedings, this Court should not take jurisdiction to hear the question. Moreover, implicit in the question is the assumption that the decision by the Minnesota Supreme Court strips Erie of the contractual right to apportion imputed gross receipts in computing the limitation on the occupation tax under Section 298.40. Because that assumption is incorrect, the issue of whether *Tidal Oil Co.* should be modified does not even arise. Obviously, this is not an appropriate opportunity for the Court to review the *Tidal Oil Co.* decision.

a. Neither the Decision Below Nor the Record Raises the Contract Clause Question Presented in the Petition.

As stated above, the Supreme Court should take jurisdiction to review federal questions involved in state court decisions only if the record shows the question was actually presented to, and decided by, the state court. Petitioner acknowledges that this issue was not raised in any state court. (Petition at 12).

Petitioner states, however, that the issue could not have been raised since a state court could not have overruled the *Tidal Oil Co.* decision. Petitioner, without any discussion, assumes this creates an exception to the rule that all federal questions must be raised in the state court. The statute does not delineate any such exception. While the Minnesota Supreme Court cannot overrule a U.S. Supreme Court decision, the Contract Clause must still be raised before the state courts. In *Illinois v. Gates,* 103 S.Ct. 2317 (1983), this Court refused to consider whether the federal exclusionary rule should be modified since the issue had not been raised in the state courts. The reasons for requiring a Petitioner to raise a federal question before the state courts are not dependent upon the state courts' having the power to decide that particular question. As this Court has stated:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in the federal system it is important that the state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves the constitutionality. Or the issue may be blocked by an adequate state ground.

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Since this issue was not brought up before the state court, the United States Supreme Court should not take jurisdiction to review this issue.

b. The Petitioner's Constitutional Rights Were Not Violated By the Minnesota Supreme Court's Decision.

The federal question, as presented by the Petitioner, of whether the Contract Clause is applicable to the Minnesota Supreme Court is moot since, even if the application of the Contract Clause were extended to action of the courts, the decision of the Minnesota Supreme Court below could not be held to violate the Contract Clause. In order for there to be a violation of the Contract Clause, each of the following requirements must be met: (1) the party must have a contractural right and (2) the action in question must deprive the party of that right. The first requirement must be fulfilled before the second requirement is even reached. As this Court stated in *Keefe v. Clark*, 322 U.S. 394, 396 (1944), "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired." If the Petitioner never had the right to apportion its imputed gross receipts in determining the limitation on the occupation tax under Section 298.40, the first requirement would not be fulfilled and the action by the Minnesota Supreme Court could not violate any right of the Petitioner under the Contract Clause.

The Petitioner, in arguing that the Minnesota Supreme Court has deprived it of the right to apportionment in computing the limitation on the occupation tax under Section

298.40, assumes that Section 298.40 permits apportionment. However, whether Petitioner has, in the first instance, the right to apportionment turns on the interpretation of the language of the contract, which is the provisions of Section 298.40 which was frozen by the Taconite Amendment. After examining all relevant facts, the Minnesota Supreme Court, in the first case it was presented the issue, stated that "the legislature did not intend the apportionment formula generally applicable to manufacturing companies to be used [under §298.40]." (App. 11a). Contrary to the Petitioner's statement that the Minnesota Supreme Court did not deny that Section 298.40 and the Taconite Amendment were enacted to ensure complete parity of taxation between taconite and manufacturing companies (Petition at 21), the Minnesota Supreme Court specifically held that Section 298.40 and the Taconite Amendment were not enacted to create such parity.

> Erie argues that disallowing income apportionment . . . defeats the purpose of the Taconite Amendment to keep the occupation taxes of a taconite company on a parity with income taxes paid by other corporations. This begs the question . . . . The issue here, however, . . . is not [the] repeal, modification or amendment [of Section 298.40], but simply what the statute says. The fact is that section 298.40 does not say that taconite producers are to be taxed in the same manner as other manufacturing companies generally, but, rather, they are to be taxed in the same manner *except* that the income apportionment formula used by other manufacturing companies does not apply.

(App. 13a-14a) (Emphasis by Court).

The Minnesota Supreme Court has determined that Section 298.40 does not give Erie the right to apportionment.

A judicial interpretation of a contract does not deprive one party of its rights under that contract. To suggest any other conclusion would be to suggest that this Court open for review under the Contract Clause a state court's interpretation of a contract in each instance when that interpretation results in a party having fewer rights than the party asserted it had. Such result would provide a back door for this Court's review of all state contract cases.

Petitioner has failed to establish the prior existence of a right which the action of the Minnesota Supreme Court has taken from it. Since that requirement is not fulfilled, there can be no violation of the Contract Clause even if it were appropriate to expand the coverage to action of the courts.

CONCLUSION

This Court should not be sidetracked by Petitioner's characterization of the issues. The first question is not whether Section 298.40 permits apportionment of imputed gross receipts nor whether Erie has sales or mere transfers. The question is whether the limitation under Section 298.40 is unconstitutional. The second question is not whether the *Tidal Oil Co.* decision should be modified but whether the Minnesota Supreme Court's construction of Section 298.40 would have violated the Contract Clause even if the Contract Clause were applicable to judicial acts.

This Court should not take jurisdiction since neither question was raised in the state court. Even if there were not jurisdictional defects, however, both questions are clearly answered in the negative.

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
MICHAEL P. SULLIVAN*
DAVID C. BAHLS
Special Counsel
300 Roanoke Building
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800
COUNSEL FOR RESPONDENT
COMMISSIONER OF REVENUE
LAURENCE J. KLUN
P.O. Box 240
Ely, MN 55731
Telephone: (218) 365-3221
COUNSEL FOR RESPONDENT
RANGE MUNICIPALITIES AND
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*Counsel of Record